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SUPREME COURT, U. S.

No. 75-1317

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

R. S. ZARKOS, R. M. DACY, SR., R. ALBRIGHT, DOE I, DOE II and DOE III,

Petitioners,

v.

ELIZABETH RUTH RIGGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE, AFTER HEARING WAS DENIED BY THE SUPREME COURT OF CALIFORNIA

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TOPICAL INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I THE DECISION BELOW, ALLOWING 42 U.S.C. § 1983 ACTIONS TO BE BROUGHT IN STATE COURTS, GIVES THE STATE COURTS IMPROPER JURISDICTION AND CREATES A SPLIT OF DECISIONS IN OUR STATES	7
II IF THIS COURT FINDS THAT 42 U.S.C. § 1983 ACTIONS MAY BE MAINTAINED IN STATE COURTS, THEN SUCH ACTIONS MUST COMPLY WITH THE APPROPRIATE STATE STATUTE OF LIMITATIONS (CALIFORNIA GOVERNMENT CODE, SECTION 911.2)	16
CONCLUSION	22
APPENDIX	23

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TABLE OF AUTHORITIES CITED

Page

CASES

Beauregard v. Wingard,
230 F.Supp. 167 (1964) 7

Brown v. Pitchess,
13 Cal.3d 518 (1975) 7,11

Chamberlain v. Brown,
223 Tenn. 25 (1969) 13

Chase Securities Corp. v. Donaldson,
325 U.S. 304 (1944) 18,19

City of Los Angeles v. Superior Court,
264 Cal.App.2d 766 (1968) 17

City of San Jose v. Superior Court,
12 Cal.3d 447 (1974) 19

District of Columbia v. Carter,
409 U.S. 418 (1973) 10

Hill v. City & County of San Francisco,
268 Cal.App.2d 874 (1969) 17

Hunter v. County of Los Angeles,
262 Cal.App.2d 820 (1968) 17

Isaacson v. City of Oakland,
263 Cal.App.2d 414 (1968) 17

Johnson v. State of California,
69 Cal.2d 782 (1968) 20

TABLE OF AUTHORITIES CITED (Continued)

Page

CASES (Continued)

McNeese v. Board of Education,
373 U.S. 668 (1963) 8

Mitchum v. Foster,
407 U.S. 225 (1972) 10

Monroe v. Pape,
365 U.S. 167 (1961) 8,13

Rogers v. Board of Education,
261 Cal.App.2d 355 (1968) 17

Rogers v. Centrone,
261 Cal.App.2d 361 (1968) 17

Sinclair v. Arnebergh,
224 Cal.App.2d 595 (1964) 21

Skidmore v. County of Solano,
154 Cal.App.2d 449 (1957) 17

Terry v. Anderson,
95 U.S. 628 (1877) 19

Tubbs v. Southern California Rapid Transit District,
67 Cal.2d 671 (1967) 17

Veriddo v. Renaud,
35 Cal.2d 263 (1950) 17

OUGH POOR COPY

TABLE OF AUTHORITIES CITED (Continued)

	Page
CASES (Continued)	
Wadley v. County of Los Angeles, 205 Cal.App.2d 668 (1962)	17
Williams v. Horvath, (L.A. 30460)	5,6,16
OTHER AUTHORITIES CITED	
28 U.S.C. §1257	2
42 U.S.C. §1981 et seq. (Federal Civil Rights Act)	12
42 U.S.C. §1983	3,5,7,8,10,11 12,15,16,19,22
United States Supreme Court, Rule 19	2
California Government Code	
§911.2	3,5,16
§911.4	19
§945.4	16
§950.2	16
§995	20

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

R. S. ZARKOS, R. M. DACY, SR.,
R. ALBRIGHT, DOE I, DOE II and
DOE III,

Petitioners,

v.

ELIZABETH RUTH RIGGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH DISTRICT, DIVISION ONE,
AFTER HEARING WAS DENIED BY
THE SUPREME COURT OF CALIFORNIA

OPINIONS BELOW

The Judgment of the Superior Court of California (Appendix A, p. A-3) and the Judgment of the Court of Appeal, Fourth Appellate District, Division One (Appendix A, p. A-2) were not written and were unreported. Petition for Hearing by the Supreme Court of California was denied (Appendix A, p. A-l).

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JURISDICTION

Petitioners petition from the decision of the Supreme Court of California, filed on December 17, 1975 denying a petition for hearing after the California Court of Appeal, Fourth District, Division One denied a petition for a Peremptory Writ of Mandate (Nov. 19, 1975). This petition for certiorari has been filed within ninety days of the decision of December 17, 1975 by the California Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and United States Supreme Court Rule 19.

Petitioners contend the California Supreme Court has decided a federal question of substance to which this Court has indicated a different view in its prior decisions. The California Supreme Court has, by its decision, created a split of decisions by the highest courts of our fifty states. Thus, petitioners would ask this Court to clear that cloud now covering a statute of the United States.

QUESTIONS PRESENTED

1. Do state courts have the needed jurisdiction to entertain actions brought under the authority of 42 U.S.C. §1983?

2. If 42 U.S.C. §1983 actions may be heard in California state courts, does the California 100-day claims statute (Cal. Gov. Code, §911.2) apply to such actions?

STATUTORY PROVISIONS INVOLVED

42 United States Code, Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress.

California Government Code, Section 911.2 reads as follows:

> A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this

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> chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

STATEMENT OF THE CASE

Petitioners demurred to respondent's complaint on the basis that said complaint did not comply with California Government Code claims presentation requirements. The demurrer was overruled on August 27, 1973.

Petitioners filed a motion for summary judgment on February 26, 1974. The grounds for such motion were again noncompliance with the claims statute. Summary Judgment was denied by the Municipal Court, San Diego Judicial District, on March 1, 1974.

Petitioners sought and obtained a Peremptory Writ of Mandate from the Superior Court, County of San Diego on May 20, 1974. The writ mandated that the Municipal Court grant the petitioner's motion for summary judgment. Pursuant to said writ, the Municipal Court granted summary judgment in

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favor of petitioners and thus dismissed respondent's complaint on May 21, 1974.

On May 27, 1975, respondent refiled a complaint in the Superior Court in and for the County of San Diego, State of California, alleging violation of her civil rights pursuant to 42 U.S.C. §1983. The complaint arose out of the same set of facts and was directed at the same petitioner police officers as were named in the prior discussed Municipal Court action.

On June 27, 1975, petitioners filed a demurrer to the complaint. The grounds for said demurrer are the grounds set forth in this petition. A hearing was held on September 16, 1975, in the Superior Court in and for the County of San Diego. After listening to argument from all parties, the court overruled petitioners' demurrer.

Petitioners filed a petition for hearing in the California Supreme Court on October 16, 1975. Petitioners had hoped their case might be argued in conjunction with *Williams v. Horvath* (L.A. 30460) since *Horvath* involved the issue of whether or not California's claim presentation statute (Cal. Gov. Code, §911.2) should be applied to actions brought in state courts pursuant to 42 U.S.C. §1983. Unfortunately,

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Williams v. Horvath had already been scheduled for oral argument on November 3, 1975, thus making it impossible for petitioners' case to be heard with it.

The California Supreme Court transferred petitioners' case to the California Court of Appeal, Fourth District, Division One on October 29, 1975. On November 19, 1975, said Court of Appeal denied petitioners' petition for Writ of Mandate.

Petitioners sought hearing again in the California Supreme Court on November 28, 1975. Hearing was denied on December 17, 1975. From this denial this Petition for Writ of Certiorari is sought.

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REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW, ALLOWING 42 U.S.C. § 1983 ACTIONS TO BE BROUGHT IN STATE COURTS, GIVES THE STATE COURTS IMPROPER JURISDICTION AND CREATES A SPLIT OF DECISIONS IN OUR STATES.

The California Supreme Court came to grips with the issue of whether 42 U.S.C. § 1983 actions could be maintained in state courts in the recent case of *Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 793 (1975). In that case the court found state courts to have concurrent jurisdiction with federal courts to entertain these actions. With all due respect to the California Supreme Court, petitioners submit that logic and holding was erroneous.

A cause of action pursuant to Section 1983 is federal in origin and cognizable only in a federal court. *Beauregard v. Wingard*, 230 F.Supp. 167, 185 (1964).

The cause of action alleged here is pleaded in terms of RS § 1979, 42 USC § 1983, which reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,

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> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
>
> That is the statute that was involved in *Monroe v. Pape* (US) *supra;* and we reviewed its history at length in that case. 365 US, at 171 et seq. The purposes were several-fold -- to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (*id.* 365 US 174), and to provide a remedy *in the federal courts* supplementary to any remedy any State might have. *Id.* 365 US 180-183. [Emphasis added.]
>
> *McNeese v. Board of Education*, 373 U.S. 668, 671-672, 10 L.Ed.2d 622, 83 S.Ct. 1433 (1963).

The history of Section 1983, reviewed at length by this Honorable Court in *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961), includes:

> . . . It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand

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> that furnished the powerful momentum behind this 'force bill' . . . .
>
> *Id.* at 174-175.
>
> . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.
>
> . . . .
> . . . .
>
> While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law. . . . [Emphasis added.]
>
> . . . .
>
> There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. . . .
>
> *Id.* at 175-176.

As this Court went on to note:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford *a federal right in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might

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> not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. [Emphasis added.]
>
> *Id.* at 180.

This Court has had ample opportunity to dissect and describe Section 1983; this Court has admonished all those who would do the same that "[a]ny analysis of the purposes and scope of §1983 must take cognizance of the events and passions of the time at which it was enacted. . . ." *District of Columbia v. Carter*, 409 U.S. 418, 425, 34 L.Ed.2d 613, 93 S.Ct. 602 (1973). This Court has looked at this section in its historical context and has made it clear that Section 1983 is a specific and uniquely federal remedy. *Mitchum v. Foster*, 407 U.S. 225, 237, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972).

> . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.
>
> *Id.* at 239.
>
> . . . *The very purpose of §1983 was to interpose the federal courts between the States and the people*, as guardians of the people's federal rights--to protect the

> people from unconstitutional action under color of state law, "Whether that action be executive, legisiative or judicial. . . ." [Emphasis added.]
>
> *Id.* at 242.

Petitioners would ask this Court to note the wording of its above cited decisions. This Court has noted that §1983 has created a new remedy for the aggrieved citizen. Respondent and others similarly situated can, as respondent did, pursue their state court remedies when their rights have been violated. The creation of §1983 actions by Congress merely gave aggrieved citizens another possible remedy.

The Attorney General of the State of California adequately argued and briefed this point in *Brown v. Pitchess*, *supra*, but the court was unable to grasp the thrust of the argument.

> The Attorney General argues against concurrent jurisdiction on the ground that section 1983 creates a "remedy" not a "right." The significance of the purported distinction is never made clear.
>
> *Id.* at 522.

The whole intent and purpose in enacting 42 U.S.C. §1983 was not to create a right for the defenseless citizen.

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This right had been bestowed him prior to the passage of the Federal Civil Rights Act (42 U.S.C. § 1981 et seq.). The purpose of its passage was to afford that citizen a remedy which he could not obtain in his own state courts.

This Court has sought out and relied on the legislative debates surrounding the passage of Section 1983 to find and declare congressional intent. This Court observed that in passing the predecessor of Section 1983, its congressional proponents realized that:

> ". . . The case has arisen . . . when *the Federal Government must resort to its own agencies to carry its own authority into execution.* Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong Globe, 42d Cong., 1st Sess., 374-376 (1871). . . . [Emphasis added.]
>
> *Mitchum v. Foster, supra,* at 240.

This Court has discussed this federal question endlessly and found that the Congress intended federal exclusivity.

A split of decisions exists in the states concerning this jurisdictional question. At least one state, Tennessee, holds that 42 U.S.C. § 1983 actions may not be maintained in its state courts.

> To the contrary, after considering the Congressional Records pertinent to this legislation which disclose its historical background, the temper of the times and climate of opinion held and expressed in this regard, we are firmly convinced that there is abundant indication that these statutes creating this action were directed to the federal trial forum, not the respective States. In any event, no policy of this State can be found in its history, judicial or otherwise, that would require the judicial branch of the government of Tennessee to entertain such action.
>
> Section 1979 was enacted as a part of the Ku Klux Act of April 20, 1871. It was the legislative response to a message sent Congress by President Grant earlier in the same year. The Federal Supreme Court has stated that the enactment had "three main aims:" (1) overriding certain kinds of state laws, (2) providing a remedy where state law was inadequate, and (3) providing "a federal remedy where the state remedy, though adequate in theory, was not available in practice." See *Monroe, et al. v. Pape, et al.* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492.
>
> *Chamberlain v. Brown*, 223 Tenn. 25, 31, 442 S.W.2d 248 (1969).

The Tennessee Supreme Court noted the argument of the "right" versus the "remedy" in its decision.

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It is plain that a remedy under the laws of Tennessee is available to plaintiff. In the very proceeding filed by plaintiff for mandamus to compel defendants to renew plaintiffs license a Chancery Court could go further and decree to plaintiff damages to which he might be entitled by reason of any unlawful conduct on the part of defendants. See *State ex rel. Wellford v. Williams* (1903), 110 Tenn. 549, 75 S.W. 948, 64 L.R.A. 418, and Gibson's Suits in Chancery, 888 (3rd Ed. 1929). The background of the instant case heretofore noted shows that plaintiff did, in fact, initiate proceedings for this remedy, and was later granted voluntary dismissal on the day after original determination of the instant case in the Hamilton County Circuit Court.

The Federal Supreme Court has held (1) that Federal jurisdiction of causes of action predicated upon R.S. sec. 1979 does not depend upon the absence of a State remedy, (2) that this Federal remedy is supplementary to any State remedy; if such is indeed available, and (3) that the State remedy need not be sought and refused before the Federal remedy is invoked. See *McNeese et al. v. Board of Education* (1963), 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 and *Monroe, et al v. Pape, et al, supra.*

> In view of the historical examination given R.S. sec. 1979 by the United States Supreme Court, and in the light of the interpretation given that section, it would be illogical indeed to hold that a State court should enforce, or is required to enforce, an alleged cause of action which owes its very existence to congressional recognition of reluctance or refusal of State Courts to act.
>
> *Chamberlain v. Brown, supra,* at 35.

Because 42 U.S.C. §1983 grants a "remedy" and not a "right" and because this "remedy" has been considered an "exclusive federal remedy," petitioners ask this Court to declare that state courts do not have jurisdiction to entertain such matters.

II

IF THIS COURT FINDS THAT 42 U.S.C. § 1983 ACTIONS MAY BE MAINTAINED IN STATE COURTS, THEN SUCH ACTIONS MUST COMPLY WITH THE APPROPRIATE STATE STATUTE OF LIMITATIONS (CALIFORNIA GOVERNMENT CODE, SECTION 911.2).

Under the California Government Code a claimant must submit a claim to the public entity not later than one hundred days after the accrual of the cause of action.

Unless the claim is made pursuant to the California Government Code, Section 911.2 requirements, the claim is barred against the public employee and the public entity. Cal. Gov. Code, §§ 945.4 and 950.2. Petitioners contend these statutes are statutes of limitations and if not complied with, then they bar the action even if it is brought under authority of 42 U.S.C. § 1983.

The California Supreme Court has this issue presently under submission in the case of *Williams v. Horvath* (L.A. 30460; argued and submitted Nov. 7, 1975). Petitioners will keep this Court informed as to any decision that might be rendered by the California Supreme Court in the above entitled case.

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Indication was given by the California Supreme Court in an earlier case entitled *Tubbs v. Southern California Rapid Transit District*, 67 Cal.2d 671, 63 Cal.Rptr. 377, 433 P.2d 169 (1967) that the claims statute should be considered a statute of limitations. 1/

The 100-day claims statute does not deny the claimant due process. The statute merely requires a *reasonable* procedural requirement in order for the action to be maintained in state courts. *Veriddo v. Renaud*, 35 Cal.2d 263, 265-266, 217 P.2d 647 (1950).

1/

Appellate decisions discussing this issue include the following: *Hill v. City & County of San Francisco*, 268 Cal.App.2d 874, 875 (1969); *City of Los Angeles v. Superior Court*, 264 Cal.App.2d 766, n. 5 at 773 and text (1968); *Isaacson v. City of Oakland*, 263 Cal.App.2d 414, 420-422 (1968); *Hunter v. County of Los Angeles*, 262 Cal.App.2d 820, 822 (1968); *Rogers v. Centrone*, 261 Cal.App.2d 361, 363-364 (1968); *Rogers v. Board of Education*, 261 Cal.App.2d 355, 358 (1968); *Wadley v. County of Los Angeles*, 205 Cal.App.2d 668, 672-673 (1962); *Skidmore v. County of Solano*, 154 Cal.App.2d 449, 452-453 (1957).

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Like any statute of limitations, the time period in which to file the claim must be observed. This Court has long recognized the justification for these statutes and the observance of their mandates.

> Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers v. Railway Exp. Agency,* 321 U.S. 342, 349, 88 L.Ed. 788, 792, 64 S.Ct. 582. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.
>
> *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 89 L.Ed. 1628, 1635, 65 S.Ct. 1137 (1944).

The only question that this Court need address is whether the statute of limitations (100-day claims statute) is

patently unreasonable. *Chase Securities Corp. v. Donaldson, supra; Terry v. Anderson,* 95 U.S. 628, 24 L.Ed. 365 (1877).

Petitioners submit there is nothing unreasonable in the 100-day claims requirement. Especially in light of the fact the California Government Code has a built-in mechanism for requesting relief from failure to file within the 100-day period. Cal. Gov. Code, §911.4.

The purpose of enactment of the claims statute was to give the public entity notice of the pending claim, thus allowing it to investigate thoroughly such claims. Prompt settlement of meritorious claims is a direct consequence of the claims statute. *City of San Jose v. Superior Court,* 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701 (1974). The public entity pursuant to the claims statute is able to budget appropriately as well as take disciplinary steps in regard to its employees.

Argument is made that since the employer (public entity) is not named as a defendant in an action brought under 42 U.S.C. §1983, compliance with the claims statute need not be met. This is simply not the case in California as evidenced by

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Johnson v. State of California, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968).

> The public employee need not suffer concern over the possibility that he will be compelled to finance and oversee a tort suit filed against him personally; the statute provides for defense by the public entity upon notice, and the employee's best interests clearly favor the giving of such notice. Moreover, the public employee faces only a slim danger of ultimate personal liability; such liability attaches only in the rare instances of injuries arising from acts either outside the scope of employment or performance with actual fraud, corruption, or malice. Indeed, a principal purpose of this indemnification scheme laid out in *Government Code*, Sections 825 to 825.6, limiting the personal threat of suit or liability, centered on assuring the zealous execution of official duties by public employees. To the extent that the ardor of public employees might be affected by the threat of personal liability, these fears will be allayed by the indemnification provisions.
>
> *Johnson v. State of California, supra*, at 791-792.

California Government Code, Section 995 has been interpreted by case law to make it *mandatory* for municipal attorneys to represent employees of the municipality upon

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request in a civil action arising out of the scope of employment. *Sinclair v. Arnebergh*, 224 Cal.App.2d 595 (1964).

It can easily be seen that the public entity is not simply an unconcerned spectator in these actions. In almost every case the entity will be called upon to defend the employees' actions and indemnify them if an adverse judgment is obtained. The entity should enjoy the benefit of the California claims statute's presentation requirement as the California Legislature intended.

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CONCLUSION

Because there now exists a split of decisions in at least two of the fifty states' supreme courts concerning the jurisdictional question of 42 U.S.C. § 1983 and because this Court has never directly addressed itself to the state court jurisdiction of such actions, petitioners respectfully urge this Court to grant certiorari in their case.

Petitioners also respectfully urge this Court to grant certiorari for the purpose of addressing the question concerning the application of California's 100-day claims statute to 42 U.S.C. § 1983 actions.

Respectfully submitted,

JOHN W. WITT
City Attorney

PAUL E. ROBINSON
Deputy City Attorney

Attorneys for Petitioners

APPENDIX

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CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

DEC 17 1975

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 14684

Zarkos

vs.

Superior Court, San Diego

Respectfully,

G. E. BISHEL
Clerk

38368-877 7-75 3M OSP

Appendix A

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COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

COURT OF APPEAL-FOURTH DIST.
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ERVIN J. THOMPSON, Clerk
K. J. Hewitt
DEPUTY CLERK

DIVISION ONE

R. S. ZARKOS, ET AL,
Petitioners,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
ELIZABETH RUTH RIGGS,
Real Party in Interest.

4 Civil NO. 14684

SUPERIOR COURT NO. 367365

BY THE COURT:

The petition for writ of mandamus is denied.

Gilbert Acting P.J.

Copies to: John W. Witt-SD
Gostin & Katz-SD
Superior Court-SD

Space Below for Use of Court Clerk Only

OCT 17 1975

16-17

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

367365
CASE NUMBER

Plaintiff/Petitioner
ELIZABETH RUTH RIGGS

Defendant/Respondent
R.S. ZARKOS, ET AL

NOTICE OF ENTRY OF JUDGMENT OR SIGNING OF AN ORDER
(Section 664.5 C.C.P.)

ORDER OVERRULING DEMURRER

☐ Judgment has been entered in the above action, as follows:

DATE	BOOK	PAGE	JUDGE

X☐ An order has been signed and filed in the above action:

DATE	JUDGE
10-8-75	HON. DANIEL C LEDDY

Robert D. Zimmet
CLERK

DECLARATION OF MAILING

On the date stated below, I caused to be mailed (by first-class mail or airmail, postage prepaid) a copy of this Notice to the parties, addressed.

Dated 10-15-75

Robert D. Zimmet
CLERK

DEREK J SIMMONS
Deputy City Attorney

John W. Witt
CITY ATTORNEY

LOUIS S KATZ
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Suite 206
San Diego, California
92101

Form 117 Co. Ch. (12-74)

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No. 75-1317

Supreme Court, U. S.
FILED
MAY 28 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

R. S. ZARKOS, T. M. DACY, SR.,
R. ALBRIGHT, DOE I, DOE II
and DOE III,

Petitioners,

vs.

ELIZABETH RUTH RIGGS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE

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TOPICAL INDEX

	Page
JURISDICTION	1
QUESTIONS PRESENTED	4
STATUTORY PROVISIONS INVOLVED	5
ARGUMENT	7
I. THE DECISION BELOW ALLOWING FEDERAL CIVIL RIGHTS ACTIONS PURSUANT TO 42 U.S.C. SECTION 1983 TO BE ENTERTAINED IN STATE COURTS OF COMPETENT JURISDICTION IS CORRECT AND MERITS NO FURTHER REVEIW BYTHIS COURT	7
II. THE 100 DAY CLAIMS PROVISION IN CALIFORNIA GOVERNMENT CODE SECTION 911.2 IS NOT A LIMITATION PERIOD BARRING 42 U.S.C. SECTION 1983 ACTIONS BROUGHT IN STATE COURTS	11
CONCLUSION	13
APPENDIX	15

GH POOR COPY

TABLE OF AUTHORITIES CITED

Page

CASES

Brazier v. Cherry, 293 F.2d 401 (1961) 12

Brown v. Pitchess, 13 Cal.3d 518 (1975) 10

Claflin v. Houseman, 93 U.S. 130 (1876) 7

Davis v. Towe, 379 F. Supp. 536 (1974) 10

Department of Banking v. Pink,
317 U.S. 264 (1942) 2

District of Columbia v. Carter,
409 U.S. 418 (1973) 10

Donovan v. Reinbold,
433 F.2d 738 (1970) 11

Gospel Army v. Los Angeles,
331 U.S. 543 (1947) 2

Grubb v. P. U. C., 281 U.S. 470 (1930) 2

Herb v. Pitcairn, 324 U.S. 117 (1945) 4

Horn v. O'Cheskey,
378 F. Supp. 1280 (1974) 10

Long v. District of Columbia,
469 F.2d 927 (1972) 10

McKnett v. St. Louis & S. F. R. R.,
292 U.S. 230 (1934) 8

BLEED THROU

TABLE OF AUTHORITIES CITED (Continued)

Page

CASES (Continued)

Market Street Railway Co. v. Railroad Commissioner of California, et al., 324 U.S. 548 (1945) 2

Mitchum v. Foster, 407 U.S. 225 (1972) 9

Monroe v. Pape, 365 U.S. 167 (1961) 9,12

Ney v. California, 439 F.2d 1285 (1971) 11

Parker v. McLain, 237 U.S. 469 (1915) 2

Radio Station WOW v. Johnson, 336 U.S. 120 (1945) 2

Smith v. Cremins, 308 F.2d 187 (1962) 11

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 10

Testa v. Katt, 330 U.S. 386 (1947) 2

Williams v. Horvath, (L.A. 30460), Administrative Office of the Courts News Release No. 53 (Decided May 4, 1976) .. 3,11

Willis v. Reddin, 418 F.2d 702 (1969) 11

OUGH POOR COPY

TABLE OF AUTHORITIES CITED (Continued)

	Page
STATUTES	
28 U.S.C.	
Section 1257	1
Section 1331	8
Section 1332	8
Section 1343	6,8
42 U.S.C.	
Section 1983	3,4,5,8,9,10, 11,12,13
Section 1988	5,12
West's Annotated California Code of Civil Procedure	
Section 472a	2
West's Annotated California Government Code	
Section 810, *et seq.*	3
Section 911.2	3,4,6,11,12
RULES OF COURT	
United States Supreme Court Rule 19	1
CONSTITUTIONAL PROVISIONS	
United States Constitution	
Article I, Section 8, Clause 9	

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IN THE SUPREME COURT OF THE UNITED STATES

R. S. ZARKOS, R. M. DACY, SR.,
R. ALBRIGHT, DOE I, DOE II
and DOE III,

Petitioners,

vs.

ELIZABETH RUTH RIGGS,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH DISTRICT,
DIVISION ONE

JURISDICTION

The petition for certiorari to the California Court of Appeal, Fourth District, Division One, invokes this Court's jurisdiction under 28 U.S.C. Section 1257 and United States Supreme Court Rule 19. Respondent respectfully submits that jurisdiction is improperly invoked by petitioners.

It is well settled that jurisdiction pursuant to 28 U.S.C. Section 1257 requires a final judgment by the highest court of

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the State in which a decision could be had. *Gospel Army v. Los Angeles*, 331 U.S. 543, 546-547; *Dept. of Banking v. Pink*, 317 U.S. 254, 268; *Market Street Railway Co. v. Railroad Commissioner of California, et al.*, 324 U.S. 548, 551; *Radio Station WOW v. Johnson*, 336 U.S. 120, 124. Certiorari is sought in this case based upon the overruling of petitioner's demurrer by the Superior Court, County of San Diego, State of California, and the denial of a writ of mandate by the California Court of Appeal, Fourth Judicial District, Division One. This determination by the California Court is not a final judgment, nor does it amount to an effective termination of the litigation between the parties. *See* West's California Annotated Code of Civil Procedure, Section 472a.

Respondent contends further that no federal question of substance is presented by the petition for certiorari. Though petitioner alleges a federal question of substance, the mere averment is not sufficient. *Parker v. McLain*, 237 U.S. 469. This Court has held on numerous past occasions that concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States is the rule rather than the exception. *Grubb v. P.U.C.*, 281 U.S. 470, 476; *Testa v. Katt*, 330 U.S. 386.

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Finally, respondent contends that an adequate and independent state ground exists to support the lower court determination that the California Tort Claims Act (California Government Code section 810, *et seq.*) does not apply to claims based on 42 U.S.C. section 1983. Section 1983 contains no limitation period within which suit must be brought. The general rule, therefore, is that the applicable state limitation period will govern.

It is wholly within the competence of the California State Courts to determine whether the provisions of the Tort Claims Act are to be construed as a general statute of limitations. Although petitioners contend that the California Courts would construe the Tort Claims Act as a general limitation provision, this simply is not the case. In its most recent pronouncement on the subject, the California Supreme Court construed the claims provisions of California Government Code section 911.2 as a condition precedent to the maintenance of an action under *state law* but the claims limitation could not apply to federal civil rights litigants. *Williams v. Horvath,* (L.A. 30460), Administrative Office of the Courts News Release No. 53 (decided May 4, 1976). (See attached Exhibit "A").

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It is well settled that the existence of an adequate and independent state ground of decision precludes review by this Court. *Harb v. Pitcairn,* 324 U.S. 117, 126-127.

Respondent therefore asks this Court to deny petitioners' petition for certiorari because:

1. No federal question of substance has been presented for determination;

2. No final judgment amounting to an effective termination of the litigation between the parties exists; and

3. An adequate and independent state ground for decision on the application of the California Tort Claims Act does exist.

QUESTIONS PRESENTED

1. Can a state court of general jurisdiction entertain actions brought pursuant to 42 U.S.C. section 1983?

2. Does the 100 day claims provisions of California Government Code 911.2 apply to bar actions in state courts predicated on section 1983, if no claim is filed?

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. 1988 states:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and

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disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment found on the party found guilty."

28 U.S.C. 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

. . . .

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Consitution or the United States or by any Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States;

. . . ."

California Government Code 911.2 provides:

"A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action."

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ARGUMENT

I

THE DECISION BELOW ALLOWING FEDERAL CIVIL RIGHTS ACTIONS PURSUANT TO 42 U.S.C. SECTION 1983 TO BE ENTERTAINED IN STATE COURTS OF COMPETENT JURISDICTION IS CORRECT AND MERITS NO FURTHER REVIEW BY THIS COURT.

This Court on numerous past occasions has taken the opportunity to delineate the distribution of judicial power between the federal and state judicial systems. The general doctrine emerging from these decisions is that state courts possess concurrent jurisdiction with federal courts over civil cases in law or equity arising under the Constitution or laws of the United States. Congress may provide for federal exclusivity under Article I, Section 8, Clause 9 of the United States Constitution. Where Congress has not so provided state courts are competent to entertain cases predicated on federal law. As stated by this Court in *Claflin v. Houseman*, 93 U.S. 130:

> Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent

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> to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction. *Id.* at 136-137.

In fact, as this Court stated in *McKnett v. St. Louis & S. F. R. R.*, 292 U.S. 230:

> [T]he Federal Constitution prohibits State courts of general jurisdiction from refusing to [enforce a cause of action] solely because the suit is brought under Federal law. *Id.* at 233.

Title 42 U.S.C. §1983 does not in itself contain any gr of jurisdiction to federal courts. Such jurisdiction would exist under 28 U.S.C. §§1331 and 1332, assuming the jurisdictiona prerequisites could be established. In addition, 28 U.S.C. secti 1343 grants original jurisdiction to Federal District Courts over Federal Civil Rights actions.

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Though these jurisdictional statutes do not preclude state court jurisdiction, petitioners argue against the general doctrine of concurrent jurisdiction by seizing on isolated language used by this Court in construing section 1983. Respondent submits that this argument has no merit. There is no question that section 1983 is designed to "afford a federal right in federal courts" (*Monroe v. Pape*, 365 U.S. 167, 180), nor that its purpose "was to interpose the federal courts between the states and the people" nor even that it created "a specific and uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225 at 237, 242). Petitioners' conclusion from the review of this language, that Congress intended federal exclusivity, does not follow. The granting of jurisdiction to federal courts does not necessitate the restriction of state court jurisdiction. The uniqueness of this federal remedy in federal courts is simply descriptive of the jurisdictional state of affairs existing at the time the Ku Klux Act of 1871 (the predecessor of section 1983) was passed. Federal original "arising under" jurisdiction did not exist at this time. It was not until 1875 that Congress granted such jurisdiction to Federal District Courts. Act of March 3, 1875, Section 1, 18 Stat. 470; *District of Columbia v. Carter*,

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409 U.S. 418, 427-428, n. 20. In light of this fact, the grant of original jurisdiction to federal courts in the predecessor of section 1983 clearly created a "unique federal remedy." *See also Sullivan v. Little Hunting Park*, 396 U.S. 229, 238.

Because of the long history of cases construing the distribution of judicial power and the lack of any indication of Congressional intent contrary to the general doctrine of concurrent jurisdiction announced in these cases, respondent would ask this Court to declare that state courts of competent jurisdiction can and indeed must entertain actions predicated on section 1983. 1/

1/ Federal and state cases dealing with the concurrent jurisdiction issue include:

Davis v. Towe, 379 F. Supp. 536, 538 (1974); *Horn v. O'Cheskey*, 378 F. Supp. 1280, 1287 (1974), *Long v. District of Columbia*, 469 F.2d 927, 937 (1972); *Brown v. Pitchess*, 13 Cal.3d 518 (1975).

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II

THE 100 DAY CLAIMS PROVISION IN CALIFORNIA GOVERNMENT CODE SECTION 911.2 IS NOT A LIMITATION PERIOD BARRING 42 U.S.C. SECTION 1983 ACTIONS BROUGHT IN STATE COURTS.

Title 42 U.S.C. section 1983 contains no federal limitation period. Petitioners contend that the claims statute should be construed as the applicable statute of limitation. Such a construction of Government Code 911.2 would be in derrogation of the California Supreme Court opinion of *Williams v. Horvath*, (May 4, 1976), *supra*, as well as federal court determinations of the applicable California limitation period. *Smith v. Cremins*, 308 F.2d 187; *Donovan v. Reinbold*, 433 F.2d 738, 741; *Willis v. Reddin*, 418 F.2d 702, 704; *Ney v. California*, 439 F.2d 1285, 1287.

Further, peitioners contend that if California Government Code 911.2 is the limitation period applicable to section 1983 actions, the only question for this Court is its substantive reasonableness. Petitioners have misstated the argument. The question is not so much whether the claims provisions is an

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unconstitutional denial of due process, but whether application of the state claims statute to an action predicated on federal law is unconstitutional under the Supremacy Clause.

Title 42 U.S.C. section 1988 provides for the application of state law in proceedings in vindication of civil rights. However, only those state laws which are "suitable to carry the law into effect" are adopted. *Brazier v. Cherry*, 293 F.2d 401, 409. Respondent contends that Government Code section 911.2 is not suited to carry section 1983 into effect. In fact, applying this statutory provision would be in derrogation of the clear purpose of section 1983 as expressed in *Monroe v. Pape, supra.*

Because the California Courts have determined Government Code section 911.2 not to be a general statute of limitation and the application of this provision would be unconsitutional under the Supremacy Clause of the United States Constitution, respondent asks this Court to declare that section 911.2 is not a limitation period barring section 1983 suits commenced in California State Courts.

CONCLUSION

Respondent respectfully urges this Court to deny the petition for certiorari for lack of jurisdiction. Alternatively, respondent respectfully urges that this Court uphold the lower court findings that concurrent jurisdiction exists over 42 U.S.C. section 1983 actions and that the California Tort Claims Act does not apply to actions brought pursuant to section 1983 in California State Courts.

Respectfully submitted,

GOSTIN & KATZ, INC.

By: LOUIS S. KATZ

Attorneys for Respondent

APPENDIX

NEWS RELEASE

ADMINISTRATIVE OFFICE OF THE COURTS
4200 STATE BUILDING, SAN FRANCISCO 94102

CONTACT:
PATRICK J. CLARK
PUBLIC INFORMATION ATTORNEY
(415) 557-2326

RELEASE DATE: May 4, 1976

RELEASE #: 53

MAY 6 1976

SUBJECT: Williams v. Horvath
[L.A. 30460]

SUPREME COURT RULES ON LAWSUIT FILED UNDER THE FEDERAL CIVIL RIGHTS ACT

The California Supreme Court today ruled that a federal civil rights lawsuit filed in state court against a government employee is not barred for failure to give 100 days notice of the claim as required by state statute. The Court further held that the government employer may indemnify an employee found liable in such an action. The unanimous opinion was written by Justice Stanley Mosk.

Today's opinion involved an action for damages against various Los Angeles police officers. The complaint alleged that the police officers deprived Charles Williams and other minors of their federal civil rights by unlawfully threatening, imprisoning and hitting them. The minors failed to comply with the notice requirement of California Government Code Section 911.2 before filing their lawsuit in superior court. Section 911.2

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requires that such personal injury claims be presented to the appropriate government employer for evaluation within 100 days after the alleged misconduct.

In ruling that the minors did not have to comply with the notice requirement of the California Tort Claims Act, the Court stated: "the California remedy of recourse to the Tort Claims Act need not be first sought before a plaintiff is free to invoke the Civil Rights Act. While there may be considerable overlap between the two statutes in given circumstances, the purposes underlying them are distinct. The state scheme was conceived to strictly limit governmental liability; the federal legislation, by contrast, was designed to ensure an adequate remedy for violations of civil rights. The 100-day claim provision of section 911.2 is a condition precedent to the maintenance of an action under state law . . . and while it may be constitutionally permissible for the Legislature to place this substantive impediment in the path of a state cause of action, it is clear that the supremacy clause will not permit a like abrogation of the perquisites [*sic*] of a federal civil rights litigant."

In ruling that the government employer may indemnify, or pay the judgment for, the errant employee, the Court noted

that Government Code Section 825 permits the employing entity to pay any such judgment rendered against its employee for his misconduct. The Court then explained: "There is nothing whatever in the language of section 825 to suggest that governmental [*sic*] employees are to be indemnified only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in section 825 to any claim or action negates this inference. Nor, as an analysis of the leading federal cases shows, is there anything in the [Civil Rights Act] which precludes a state from indemnifying public employees when liability is founded upon that [Act]."

#